

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

1. Crl. Appeal No. S-1732-SB of 2005

Mukhtiar Chand Appellant

Versus

State of Punjab Respondent

2. Crl. Appeal No. S-1643-SB of 2005

Gian Chand Appellant

Versus

State of Punjab Respondent

DATE OF DECISION: 17.1.2014

BEFORE:- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present:- Mr. GBS Dhillon, Advocate
for the appellant in Crl. Appeal No. S-1732-SB of 2005.

Mr. Manpreet Singh, Advocate
for the appellant in Crl. Appeal No. S-1643-SB of 2005

Mr. Rupam Aggarwal, DAG, Punjab.

DAYA CHAUDHARY, J.

This judgment shall dispose of two criminal appeals bearing Nos. S-1732-SB of 2005 and S-1643-SB of 2005 arising out of a common judgment passed by the trial Court based on similar incident. However, for the sake of convenience, the facts are being extracted from Criminal Appeal No. S-1732-SB of 2005.

The accused-appellants, namely, Mukhtiar Chand and Gian Chand were convicted for offence punishable under Section 15 of NDPS Act (hereinafter referred to as 'the Act') and sentenced to undergo RI for a period of ten years and to pay a fine of ₹ one lac each and in default of

payment of fine to further undergo RI for a period of six months by Judge, Special Court, Nawanshahr, which is the subject matter of challenge in the present appeals.

Briefly, the facts of the prosecution version are that on 8.6.2001, SI Surjit Kumar, Incharge CIA Staff, Nawanshahr accompanied by ASI Raunki Dass and other police officials was present in the area of village Bhin in connection with patrolling duty. A secret information was received that two persons, namely, Mukhtiar Chand and Gian Chand were transporting poppy husk in Tata 709 bearing registration No. PB-10-AF-1019 for distributing the same in the village and in case a naka was set up on the bridge of the canal, they could be apprehended. Naka was set up on the bridge of the canal. The said vehicle was stopped by the police party. Accused-Mukhtiar Chand was driving the vehicle, whereas, accused-Gian Chand was sitting on the bags lying on the rear portion of the vehicle. On the basis of suspicion, an option was given to the accused whether they wanted to be searched in the presence of a Gazetted Officer or a Magistrate to which they opted to be searched in the presence of a Gazetted Officer. DSP Balbir Singh was contacted on wireless and was requested to reach at the spot. On reaching the spot, he disclosed his identity to the appellants. Both the accused reposed confidence in DSP Balbir Singh and search was conducted in his presence. Twenty bags containing 35 kgs each of poppy husk were recovered from the vehicle and out of those bags, 250 gms poppy husk each was drawn as samples and were turned into parcels. Sample parcels and bags were sealed with seal bearing impressions SK and the same were handed over to PW Sohan Lal. Case property was taken into possession vide memo which was duly attested by the witnesses. On personal search of both the accused, currency notes of ₹ 50/- each were recovered from them and the same

were also taken into possession vide separate recovery memos. The accused were arrested. The parcels as well as case property were handed over to the investigating officer, which were deposited with MHC Paramjit Singh. The samples were sent to chemical examiner for analysis. As per report of the chemical examiner, the contents of the sample parcels were found to be poppy husk.

On completion of investigation, the accused were challaned and after supplying copies of all documents to both the accused under Section 207 of Cr.P.C., were charged for the offence punishable under Section 15 of the Act.

To substantiate the charge, the prosecution examined as many as seven witnesses, namely, Constable Mehar Chand (PW-1), ASI Raunki Dass (PW-2), Inspector Baldev Singh (PW-3), DSP Balbir Singh (PW-4), Surinder Kaur, Clerk, DTO Office, Ludhiana (PW-5), ASI Paramjit Singh (PW-6) and SI Surjit Kumar (PW-7).

On closure of prosecution evidence, statements of both the accused were recorded under Section 313 Cr.P.C., wherein, they claimed false implication and pleaded not guilty. Accused stated in their respective statements that they were forcibly lifted from Ludhiana on 7.6.2001 and a false case was planted upon them. It was also stated that a telegram was also sent to SSP, Nawanshahr by Jasbir Singh s/o accused-Gian Chand. The accused also examined Constable Dharamender Singh as DW-1 in defence.

On appraisal of evidence and after hearing counsel for the parties, the appellants were found guilty for an offence punishable under Section 15 of the Act and they were convicted and sentenced as mentioned above.

Learned counsel for the appellants have raised various

arguments to challenge judgment of conviction and order of sentence. He submits that PW-Sohan Lal, who was joined as independent witness was a stock witness of the police as he had appeared as witness in other cases also. To prove this, he has placed on record copies of FIR Ex. D1 to D7, a perusal of which shows that he had been appearing as witness in earlier cases also. Learned counsel also submits that conscious possession of the accused was not established as it has been alleged that accused-Gian Chand was sitting over the bags but merely by sitting over the bags, it could not be inferred in any manner that the bags were relating to the accused persons. Learned counsel also contends that there is violation of Section 42 of the Act and there was a delay of seven days in sending the samples. All the formalities were completed while sitting in the police station and even Form No. 29 was not filled up at the spot. It is also the contention of learned counsel that owner of the vehicle was not made an accused and no efforts were made by the investigating officer even to record the statement of the owner. The vehicle from which recovery was effected was not found to be in a working condition as the documents of the vehicle were with the Insurance Company and the same has been admitted by the Investigating Officer. Learned counsel also submits that there are serious contradictions and discrepancies in the statements of investigating officer as well as DSP Balbir Singh which creates doubt in the prosecution version. From the statements of prosecution witnesses it is clear that DSP was present even before the option was given by the accused. Learned counsel has also relied upon the judgments of Hon'ble the Apex Court in **Rajender Singh Vs. State of Haryana** 2011 (105) AIC 52 and of this Court in **Bhola Singh Vs. State of Punjab** 2005 (2) RCR (Criminal) 520, **Malkiat Singh @ Kala Vs. State of Punjab** 2009 (1) RCR (Criminal) 353, **Jaswinder Singh Vs. State of Punjab** 2009 (1) RCR

(Criminal) 425, **Jaswinder Singh @ Binder Vs. State of Punjab** 2011 (1) RCR (Criminal) 678, **Nirmal Singh Vs. State of Punjab** 2011 (5) RCR (Criminal) 201 and **Radhey Sham Vs. State of Haryana** 2011 (2) RCR (Criminal) 90, in support of his contentions.

Learned counsel for the respondent-State submits that the judgment of trial Court is well reasoned and detailed one and the conviction has been awarded on proper appreciation of evidence and no interference is required for.

Heard the arguments advanced by learned counsel for the parties and have also gone through the judgment of the trial court and evidence available on record.

The judgment of the trial Court has been challenged mainly on the ground that independent witness was a stock witness of the police and the same has been proved that he had appeared as a witness in other cases as well. The FIRs Ex. D1 to D7 were also produced on record in this regard. The conscious possession has not been established as merely by sitting over the bags, it cannot be said that it was a case of conscious possession. There was delay in sending samples, Form No. 29 was not filled up at the spot and even the vehicle from which the recovery has been effected was not in a working condition as the documents were with the Insurance Company.

ASI Raunki Dass (PW-2) has admitted in his cross-examination that no secret information was sent to any senior officer of the police. He has also stated that he did not remember if the keys of the vehicle were taken into possession or not. He has admitted that gunny bags were unloaded after arrival of DSP at about 7.45 pm. He has also stated that he did not know whether Form No. 29 was filled up at the spot or not and who filled up the same.

Similarly DSP Balbir Singh (PW-4) has stated in his cross-examination that he did not receive any information in writing. He has denied whether any report was sent in writing to senior officer regarding recovery of 20 bags of poppy husk. The DSP was not aware as to who was driving the canter or who was sitting on other seat. No seal was affixed by DSP as has been admitted in the cross-examination. From perusal of statement of DSP, even his presence at the place of recovery has not been proved.

SI Surjit Kumar (PW-7) has admitted in his cross-examination that some of the bags were not bearing any seal and even there was no mention of particulars of the case. Regarding joining of any independent witness, he has stated that an attempt was made to join at the time of recovery but none came forward to join and no names were mentioned as to who were asked to join. The investigating officer has also admitted in his cross-examination that no information was sent in writing to the senior officer of the Police. He has admitted that Form No. 29 was filled up on 11.6.2004. The RC of the vehicle was not taken into possession as it was with the insurance Company. It has also been admitted that the statement of any official of the Insurance Company was not recorded and no inquiry was conducted from DTO office. It has also been admitted that left side window of the vehicle was damaged and only 407 was ascribed on the vehicle. The case property was produced before SHO after 3-4 hours after recovery and no memo regarding handing over of the case property was prepared. He has admitted in his cross-examination that DSP reached at the spot at 7.30 pm.

On perusal of evidence available on the file not only link evidence is missing but there is a delay of seven days in sending of the samples as FIR was registered on 8.6.2001 and samples were sent to FSL

on 15.6.2001. Neither the seals were affixed on bags of recovery nor any particulars of the case were mentioned. DSP Balbir Singh (PW-4) has admitted in his statement that he did not affix any seal as he was not having any seal with him at that time. Form No. 29 was also not filled up at the place of recovery, which is apparent from the statements of prosecution witnesses and as such the prosecution has miserably failed to prove case against accused beyond reasonable doubt.

In re : State of Punjab v. Balkar Singh and another 2004(3)

Supreme Court Cases 582 the Apex Court held that "merely by being found to be present at the place where the poppy bags were found and the failure to give any satisfactory explanation for being so present did not prove that the accused persons were in possession of the said poppy bags. In fairness, the Police should have conducted further investigation (as to transportation of poppy bags to the place of incident, ownership of the poppy husk etc.) to prove that the accused were really in possession of the said articles." In the instant one, the Investigator did not take the pains to ascertain as to how the bags of poppy straw were transported to the alleged place of recovery or who was their owner."

In **Baldev Singh Vs. State of Punjab 2005 (1)** Recent Criminal Reports (Criminal) 823 the accused were sitting on two bags of poppy husk. It was held that "the accused would be guilty of offence under NDPS Act, if it is established that he was in conscious and intelligent possession and not merely the physical presence of the accused in proximity or even in close proximity of the object. The accused can not be inferred that they were in conscious possession." In **Kashmir Singh v. State of Punjab 2006(2) Recent Criminal Reports(Criminal) 477 : [2006 (4) All India Criminal LR (Pb. & Hry.) 4481**, the Full Bench of this Court has observed as under :

"12. When the Trial Judge records the statement of an accused person under Section 313 Criminal Procedure Code with regard to the circumstances which have appeared in evidence against him, the learned judge gives the accused an opportunity to explain those circumstances. The accused generally denies the prosecution case against him, but it is an opportune moment for him to plead any type of defence that he may like to take. Therefore, by extending the provisions of Section 313 Criminal Procedure Code and on first principles of fair trials as well, there is need to give every accused person an opportunity to explain the case against him. Wheresoever, the presumption under Sections 35 and 54 is to be raised, it would be advisable for the Trial Court to frame a question under Section 313 Criminal Procedure Code in order to give the accused a fair opportunity to rebut the presumption but It is strange that Trial Court do not give the accused this opportunity. Unless the accused have been given the opportunity to prove that he had no such mental state as presumed under Section 35 or that he had satisfactorily accounted for the possession which was being presumed against him under Section 54, the respective presumptions cannot be raised against the accused.

19. For the above reasons, we would answer the question raised by stating that no presumption under Sections 35 and 54 should be used against the accused unless he has been given an opportunity to rebut the presumptions in his statement under Section 313 Criminal Procedure Code by being called upon to explain the circumstances which give rise

to the presumptions. Thereafter, the accused should be given an opportunity to lead to the presumptions. Thereafter, the accused should be given an opportunity to lead evidence in defence in support of his stand. However, there is no real or apparent conflict regarding the correct meaning of "possession" which needs to be resolved."

In ***State of Punjab v. Hari Singh and Others, 2009(2) Recent Criminal Reports (Criminal) 143*** it has been observed by the Hon'ble Supreme Court as under-

"19. For the above reasons, we would answer the question raised by stating that no presumption under Section 35 and 54 should be used against the accused unless he has been given an opportunity to rebut the presumptions in his statement under Section 313 Criminal Procedure Code by being called upon to explain the circumstances which give rise to the presumptions. Thereafter, the accused should be given an opportunity to lead evidence in defence in support of his stand. However, there is no real or apparent conflict regarding the correct meaning of "possession" which needs to be resolved."

In ***Raj Kumar v. State of Punjab, 2005(1) Recent Criminal Reports(Criminal) 70***, a bag containing opium lying between Raj Kumar and Hawa Singh's seat was recovered. The Division Bench of this Court held that both the accused have been charged for possession of opium, but neither of them had been asked any question in their statements under Section 313 Criminal Procedure Code that he was in conscious possession of opium. Therefore, neither presumption under Section 35, nor the presumption under Section 54 of the Act would be attracted.

A careful delving into the Statutory statement of the appellant would reveal that no specific question with regards to conscious possession has been framed nor put to the appellant while examining him under Section 313 of Criminal Procedure Code. Thus, the conscious possession is not established nor the presumption under Section 35 or 54 of the Act can be drawn in favour of the prosecution.

In **Satnam Singh v. State of Punjab, 1996(3) Recent Criminal Reports Criminal) 396** it has been held that "when the prosecution alleges that material witness has been won over by the accused, still it is necessary that such witness must be produced and examined at the trial to reveal the truth, especially when the seal is allegedly entrusted to him after use."

In view of facts as mentioned above, it can be concluded that the judgment of conviction and order of sentence are not based on proper appreciation of evidence as not only the serious contradictions and infirmities are there but there is a violation of mandatory provisions regarding delay in sending of the samples and the presence of DSP at the spot. The conscious possession of the recovery from the present appellants has also not been proved. Even the inference under Section 35 or 54 of the Act cannot be drawn in favour of the prosecution. The appeals deserve to be allowed by setting aside the judgment of conviction and order of sentence of the trial Court. Accordingly the appellants are acquitted of the charges framed against them by giving benefit of reasonable doubt.

17.1.2014
pooja

(DAYA CHAUDHARY)
JUDGE

